

1 **WO**

2  
3  
4  
5  
6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
8

9 United States of America, ) CV 13-2141-PHX-GMS (MHB)  
10 Plaintiff, ) CR 09-1114-PHX-GMS  
11 v. ) **REPORT AND RECOMMENDATION**  
12 Jose Luis Pita-Mota, )  
13 Defendant/Movant. )  
14

15 TO THE HONORABLE G. MURRAY SNOW, UNITED STATES DISTRICT JUDGE:  
16 Movant Jose Luis Pita-Mota, who is confined in the Federal Correctional  
17 Institution-Cumberland in Cumberland, Maryland, has filed a *pro se* Motion Under 28 U.S.C.  
18 § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (CV 13-  
19 2141 (“CV”) Doc. 1; CR 09-1114 (“CR”) Doc. 333.) Plaintiff United States of America (the  
20 “Government”) filed a Response (CV Doc. 4), but despite having the opportunity to do so,  
21 Movant has not filed a reply.

22 **BACKGROUND**

23 Movant raises three grounds for relief in the § 2255 Motion: (1) Movant’s counsel was  
24 ineffective by failing to attempt to negotiate a favorable plea agreement; (2) Movant’s  
25 counsel was ineffective by failing to object to the admission of a co-defendant’s plea  
26 agreement on the ground that the plea agreement constituted a guilty plea of a non-testifying  
27 co-defendant; and (3) Movant’s counsel was ineffective by failing to raise, on appeal, the  
28 issue that the Court abused its discretion in denying Movant’s motion for severance and by

1 counsel's failure to argue the inadmissibility of a co-defendant's plea agreement as a  
2 violation of Movant's rights to confrontation.

3 On June 3, 2010, a federal grand jury returned a Second Superseding Indictment  
4 charging Movant with conspiracy and possession with the intent to distribute 50 grams or  
5 more of methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and  
6 841(b)(1)(A)(viii); possession of firearms in furtherance of a drug trafficking offense, in  
7 violation of 18 U.S.C. § 924(c); felon in possession of a firearm in violation of 18 U.S.C. §§  
8 922(g)(1) and 924(a)(2); and illegal reentry by a removed alien in violation of 8 U.S.C. §  
9 1326(a), as enhanced by § 1326(b)(1). (CR Doc. 120.) Three co-defendants were also  
10 charged with those drug and similar firearm counts. (Id.)

11 Jury trial began on June 22, 2010, after Movant and three co-defendants rejected plea  
12 agreements. (CR Doc. 151 - RT 6/18/10 36-38.) On June 30, 2010, the jury found Movant  
13 guilty of the two drug trafficking counts (Counts 1 and 2); felon in possession of a firearm  
14 (Count 6); and illegal reentry of a removed alien (Count 9). (CR Doc. 162 - RT 6/30/10  
15 1045-46.) The jury found Movant not guilty of possession of a firearm in furtherance the  
16 drug trafficking offenses (Count 3). (Id.)

17 On October 21, 2010, the Court sentenced Movant to a sentence of 324 months'  
18 imprisonment, the low end of the resulting Sentencing Guideline range, consisting of  
19 concurrent terms of 324 months on each of the drug trafficking counts and 120 months on  
20 the felon in possession and reentry after deportation counts. (CR Doc. 240 - RT 10/21/10  
21 15-16.) The Court also sentenced Movant to concurrent terms of supervised release to follow  
22 his release from imprisonment; five years on the drug trafficking counts, and three years on  
23 the felon in possession and reentry after deportation counts. (Id.)

24 Movant appealed and argued that the Court erred (a) in allowing modus operandi  
25 testimony regarding drug traffickers; (b) by admitting a redacted statement of a  
26 non-testifying co-defendant; (c) by admitting "other act" evidence against two co-defendants;  
27 (d) by admitting lay testimony of voice identification; and (e) by denying a downward  
28 adjustment for acceptance of responsibility and imposing the 324-month sentence. See C.A.

1 No. 10-10514. The Ninth Circuit Court of Appeals rejected Movant's claims and affirmed  
2 his convictions and sentences in a memorandum disposition. (CR Doc. 320-1.) The Court  
3 of Appeals found that there was no reversible error and that "the evidence against Defendant  
4 was overwhelming." (*Id.* at 2-3.) The mandate issued on June 26, 2012. (CR Doc. 320.)

5 Movant filed a petition for certiorari to the United States Supreme Court on September  
6 12, 2012. (CV Doc. 4, Exh. A.) The petition was denied on October 15, 2012. (CV Doc.  
7 4, Exh. B.)

## 8 DISCUSSION

9 The Government claims that all three grounds for relief set forth in Movant's Motion  
10 are without merit and fail to establish that he is entitled to relief. The Government contends  
11 that Movant's Motion should be denied and dismissed with prejudice.

12 The two-prong test for establishing ineffective assistance of counsel was set forth by  
13 the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on an  
14 ineffective assistance claim, a convicted defendant must show (1) that counsel's  
15 representation fell below an objective standard of reasonableness, and (2) that there is a  
16 reasonable probability that, but for counsel's unprofessional errors, the result of the  
17 proceeding would have been different. *See id.* at 687-88. There is a strong presumption that  
18 counsel's conduct falls within the wide range of reasonable assistance. *See id.* at 689-90.  
19 To satisfy the second prong of the Strickland test, "the defendant must show that there is a  
20 reasonable probability that, but for counsel's unprofessional errors, the result of the  
21 proceeding would have been different." *Id.* at 694.

### 22 A. Ground One

23 In Ground One, Movant claims that his counsel was ineffective for "failing to attempt  
24 to negotiate a favorable Plea Agreement, which would have given [Movant] the benefit of  
25 a less harsh sentence." However, Movant's claim is belied by the record. At the final  
26 pretrial conference, in Movant's presence, counsel for the Government memorialized a plea  
27 offer that had been tendered. Then, defense counsel memorialized Movant's decision to  
28 reject that plea offer:

1 MR. MORSE: Your Honor, if the Court would indulge me.

2 The government made a plea offer that was very favorable about two weeks  
3 ago and the defendants rejected it. I just want to make a record so they're  
4 advised of what they potentially face after trial.

5 THE COURT: All right. Go ahead.

6 MR. MORSE: Your Honor, as to Juan Carreno-Gutierrez . . . .

7 MR. MORSE: Mr. Jose Luis Pita-Mota was offered to plea to the drug  
8 trafficking crime, the conspiracy offense, with a stipulation to 10 years in  
9 prison. I believe that because of his criminal history, he would be looking at  
10 a range between 210 to 293 months, plus an additional five years if he were  
11 convicted of the firearm in furtherance of the drug trafficking crime.

12 THE COURT: Mr. Ralls?

13 MR. RALLS: With Mr. Pita-Mota, Jose Luis, we've spent several hours  
14 discussing the government's plea offer, the Federal Sentencing Guidelines, the  
15 mandatory sentencing. Not only have I spoken with him, but I spent several  
16 hours with his family also discussing that, and it is his decision that he wants  
17 to proceed to trial.

18 (CR Doc. 267 - RT 6/18/10 35-38.)

19 The record conclusively establishes that defense counsel negotiated a plea agreement  
20 that would have resulted in a reduced sentence, and Movant rejected that plea agreement.  
21 Accordingly, the Court will recommend that Ground One be denied because counsel was not  
22 ineffective and Movant was not prejudiced.

## 23 **B. Ground Two**

24 In Ground Two, Movant alleges that trial counsel was ineffective for failing "to object  
25 to the admission of Hernandez's plea agreement on the ground that the plea agreement  
26 constituted a guilty plea of a non-testifying co-defendant."

27 Co-defendant Hernandez pled guilty straight to the Indictment, without the benefit of  
28 a plea agreement. (CR Doc. 116.) Hernandez's plea agreement was neither marked as an  
exhibit nor admitted into evidence. (CR Doc. 164.)

Because Hernandez's plea agreement was not admitted into evidence, defense counsel  
was not ineffective for failing to object to non-existent evidence. Nor can Movant show the

1 result of the proceeding would have been different had his counsel objected. The Court will  
2 therefore recommend that Ground Two be denied.

3 **C. Ground Three**

4 In Ground Three, Movant claims ineffective assistance of appellate counsel related  
5 to two issues: (1) the failure to appeal the Court's denial of his motion to sever; and (2) the  
6 failure to appeal regarding the admission of the Hernandez plea agreement.

7 As noted for Ground Two – there was no Hernandez's plea agreement and it was not  
8 admitted in Movant's trial. Moreover, the first issue is equally inconsistent with the record  
9 of the proceedings in this case as Movant's trial counsel advised the Court that the severance  
10 motion was moot after the Government agreed to redact the co-defendant's statement:

11 THE COURT: All right.

12 Then we have the Bruton motion by Mr. Ralls. Do you want to be heard on  
13 that, Mr. Ralls?

14 MR. RALLS: Very briefly.

15 The government has basically provided a redacted statement of the statements  
16 that will be given, testified to by the – by the agents. I'm satisfied that that  
deals with the issues that I had with the post-arrest statements. So at this point,  
I believe my motion is moot, in light of what the government has given me.

17 THE COURT: All right. Thank you. Any other defendants want to be heard  
18 on that?

19 MR. PARK: It's the same issue. Mr. Morse has already provided redacted  
20 statements as pertain to one of the non-testifying co-defendants, so if we can  
work that out, that's what he will be introducing.

21 THE COURT: All right.

22 (CR Doc. 267 - RT 6/18/10 5-6.)

23 Following this exchange, the Court found that Movant's motion to sever defendants  
24 was moot. (CR Doc. 146.) Federal Rule of Criminal Procedure 12(b)(3)(D) requires a  
25 defendant to move to sever before trial, and to renew the motion at the close of evidence.  
26 See United States v. Sullivan, 522 F.3d 967, 981 (9<sup>th</sup> Cir. 2008). If the defendant does not  
27 renew the motion, he waives appellate review. See id. Because Movant conceded that the  
28 motion was moot and did not renew it at the close of evidence, appellate counsel could not

1 appeal the denial of severance. Therefore, the Court finds that appellate counsel was not  
2 ineffective, and will recommend that Ground Three be denied.

3 **CONCLUSION**

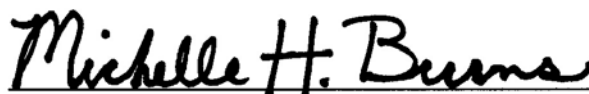
4 Having determined that Movant has failed to satisfy either prong of the Strickland  
5 standard with respect to the claims asserted in his Motion, the Court will recommend that  
6 Movant's Motion to Vacate, Set Aside, or Correct Sentence be denied and dismissed with  
7 prejudice.

8 **IT IS THEREFORE RECOMMENDED** that Movant's Motion Under 28 U.S.C.  
9 § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (CV Doc.  
10 1; CR Doc. 333) be **DENIED and DISMISSED WITH PREJUDICE**;

11 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave  
12 to proceed *in forma pauperis* on appeal be **DENIED** because Petitioner has not made a  
13 substantial showing of the denial of a constitutional right.

14 This recommendation is not an order that is immediately appealable to the Ninth  
15 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
16 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
17 parties shall have fourteen days from the date of service of a copy of this recommendation  
18 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);  
19 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
20 days within which to file a response to the objections. Failure timely to file objections to the  
21 Magistrate Judge's Report and Recommendation may result in the acceptance of the Report  
22 and Recommendation by the district court without further review. See United States v.  
23 Reyna-Tapia, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure timely to file objections to any  
24 factual determinations of the Magistrate Judge will be considered a waiver of a party's right  
25 to appellate review of the findings of fact in an order or judgment entered pursuant to the  
26 Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

27 DATED this 12th day of November, 2014.

28 

Michelle H. Burns  
United States Magistrate Judge